NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS, PENINSULAR MALAYSIA

v.

TANJONG JARA BEACH HOTEL SDN BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: W-02-636-1998]
23 MAY 2003

LABOUR LAW: *Industrial Court - Jurisdiction - Interpretation of collective agreement - Whether Industrial Court has jurisdiction to interpret collective agreement in non-compliance proceedings - Nature and extent of interpretative powers - Industrial Relations Act 1967, ss. 33, 56*

LABOUR LAW: *Employment - Annual bonus - Whether employer obliged to pay annual bonus after cessation of business and termination of workmen's services - Whether employer's conduct smacked of unfair labour practice - Interpretation of bonus clause under contract of employment and collective agreement - Correct approach in interpreting collective agreements - Whether should be broad and liberal*

Having decided to temporarily cease its operations with effect from 1 December 1996, the respondent/employer ('the hotel') gave notice of the same on 1 September 1996 to the appellant/trade union ('the union') which represented the workmen in the hotel's employ. At the same time, the hotel also served individual notices of termination of service on its workmen that their employment would be terminated with effect as of 1 December 1996.

Under their contracts of employment which were housed in a collective agreement ('the CA'), each workman was entitled to, *inter alia*, be paid an annual bonus on 31 December of each year. As it transpired, the hotel refused to pay this annual bonus to its workmen on 31 December 1996 on account that they had ceased to be its employees as at that fateful date.

When the matter went before the Industrial Court, the president was unimpressed with this argument and held that the hotel was, upon a true interpretation of the CA, obliged to pay the annual bonus to the affected workmen on a *pro rata* basis. The High Court disagreed with the president and *certiorari* was issued to quash his award. The union appealed to the Court of Appeal.

The two principal issues that arose for decision before the justices of appeal were: (i) whether the Industrial Court has the 'threshold' jurisdiction to exercise its interpretative powers under s. 33 of the Industrial Relations Act 1967 ('the IRA') in non-compliance proceedings brought under s. 56 the IRA; and (ii) whether the Industrial Court's interpretation of the CA disclosed an error of law in the 'Anisminic' sense.

Held:
Per Gopal Sri Ram JCA

[1] The Industrial Court has the threshold jurisdiction to interpret a collective agreement in order to determine whether there has in fact been a non-compliance in respect thereof. Sections 33(1) and 56 of the IRA cannot be treated as being housed in watertight compartments with no possible overlap under any circumstances. (*Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 CA followed.) (pp 335 e-h & 336 a-b)

[2] The CA was a document regulating the relationship between the hotel and its workmen in an industrial-relations environment. It would thus be thoroughly wrong to approach such a document with a profusion of technicalities and legal form. Indeed the High Court fell into error when it accepted the hotel's invitation to interpret the CA in a narrow and pedantic fashion. This was a case in which the hotel had taken careful steps to evade its obligations under the CA. It ensured that the affected workmen were no longer under its employment at that contractually operative date for the sole purpose of preventing them from claiming the annual bonus. This conduct smacked of unfair labour practice. The Industrial Court, acting in accordance with well-established principles of industrial law and equity, had rightly found against the hotel. There was no error of law in its award. (*Kesatuan Pekerja-Pekerja Perkayuan v. Syarikat Jengka Sdn Bhd* [1997] 2 CLJ 276 CA and *Progress Castings (1982) Sdn Bhd v. Metal Industry Employees Union* [1983] 2 ILR 250 IC followed.) (pp 336 c-h, 337 a-h & 338 a-f)

[Union's appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Setelah memutus untuk menamatkan operasinya bermula 1 Disember 1996, responden/majikan ('hotel') memberi notis bertarikh 1 September 1996 mengenai penamatan tersebut kepada perayu/kesatuan sekerja ('kesatuan'), yang mewakili pekerja-pekerja hotel. Disamping itu, hotel juga menyerahkan notis-notis penamatan kerja secara peribadi kepada semua pekerjanya menyatakan bahawa mereka akan diberhentikan bermula 1 Disember 1996.

Di bawah perjanjian perkhidmatan yang termaktub dalam perjanjian bersama ('CA'), setiap pekerja adalah berhak, antara lain, untuk dibayar bonus tahunan setiap 31 Disember. Bagaimanapun, dalam kes semasa, hotel telah enggan membayar bonus pada 31 Disember 1996, atas alasan bahawa pekerja-pekerja, pada tarikh itu, bukan lagi berkhidmat dengannya.

Apabila pertikaian yang berbangkit dibicarakan di Mahkamah Perusahaan, Presiden menolak alasan yang diberikan oleh hotel, sekaligus memutuskan bahawa, mengambilkira tafsiran sebenar CA, hotel bertanggungan untuk membayar bonus tahunan kepada pekerja-pekerja secara *pro rata*. Mahkamah Tinggi bagaimanapun tidak bersetuju dengan Mahkamah Perusahaan dan dengan itu mengeluarkan *certiorari* bagi melupuskan award. Kesatuan merayu kepada Mahkamah Rayuan.

Dua isu penting yang timbul untuk keputusan hakim-hakim rayuan ialah: (i) sama ada Mahkamah Perusahaan mempunyai bidangkuasa puncak atau 'threshold jurisdiction' untuk melaksanakan kuasa mentafsirnya di bawah s. 33 Akta Perhubungan Perusahaan 1967 ('IRA') dalam prosiding ketidakpatuhan di bawah s. 56 IRA; dan (ii) sama ada tafsiran yang dibuat Mahkamah Perusahaan terhadap CA membangkitkan suatu kesilapan undang-undang dalam bentuk kesilapan 'Anisminic'.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Mahkamah Perusahaan mempunyai bidangkuasa 'threshold' untuk mentafsir sesuatu perjanjian bersama bagi mempastikan sama ada wujud apa-apa ketidakpatuhan terhadapnya. Seksyen 33(1) dan 56 IRA tidak boleh dianggap sebagai berada dalam satu ruang yang sempit tanpa apa-apa kemungkinan pertindihan walau dalam keadaan apa sekalipun. (*Syarikat Kenderaan Melayu Kelantan Bhd lwn. Transport Workers Union* [1995] 2 CLJ 748 CA diikuti.)

[2] CA adalah satu dokumen yang menyelia perhubungan di antara hotel dan pekerja-pekerjanya dalam suasana perhubungan perusahaan. Oleh itu, ianya satu kesilapan besar untuk mendekati dokumen sedemikian dengan berbagai-berbagai persoalan teknikal dan perundangan. Adalah jelas bahawa Mahkamah Tinggi telah silap bilamana ia menerima permohonan hotel untuk mentafsir CA dalam bentuknya yang sempit dan ketat. Ini adalah kes di mana hotel telah mengambil langkah-langkah untuk mengelak dari obligasi-obligasinya di bawah CA. Ia memastikan bahawa pekerja-pekerja yang terlibat tidak lagi berada di bawah perkhidmatannya pada tarikh berkaitan semata-mata bagi menghalang mereka dari menuntut bonus tahunan. Perlakuan sebegini menghampiri amalan perburuhan yang tidak adil. Mahkamah Perusahaan, yang bertindak mengikut prinsip undang-undang perusahaan dan ekuiti yang sudah lama diterima pakai, telah dengan betulnya membuat keputusan yang tidak berpihak kepada hotel. Tiada kesilapan undang-undang pada awardnya. (*Kesatuan Pekerja-Pekerja Perkayuan lwn Syarikat Jengka Sdn Bhd* [1997] 2 CLJ 276 CA dan *Progress Castings (1982) Sdn Bhd lwn. Metal Industry Employees Union* [1983] 2 ILR 250 diikuti.)

Rayuan kesatuan dibenarkan.]

Case(s) referred to:

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***

Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 3 CLJ 777 SC ***(refd)***

Kesatuan Pekerja-pekerja Perkayuan v. Sykt Jengka Sdn Bhd [1997] 2 CLJ 276 CA ***(foll)***

Progress Castings (1982) Sdn Bhd v. Metal Industry Employees Union [1983] 2 ILR 250 ***(foll)***

Sykt Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(foll)***

Legislation referred to:

Industrial Relations Act 1967, ss. 33(1), 56

For the appellant - N Mahalingam; M/s Genga Maha Wong & Co
For the respondent - Thavalingam Thavarajah; M/s Zaid Ibrahim & Co

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R3-25-154-97]

Reported by Gan Peng Chiang

JUDGMENT
(Oral)

Gopal Sri Ram JCA (delivering the judgment of the court):
This appeal was argued yesterday. At the conclusion of arguments we reserved judgment to today. Our decision and the attendant reasons now follow.

There are two short points in this appeal. The first is whether the Industrial Court has jurisdiction to exercise its interpretive powers under s. 33 of the Industrial Relations Act 1967 ("the Act") in non-compliance proceedings brought under s. 56 of the Act. The second question is whether the interpretation by that court of the collective agreement in the instant case discloses an error of law.

It must be recognised at once that the first issue concerns the threshold jurisdiction of the Industrial Court or jurisdiction in the narrower sense. See, *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777. The second is concerned with jurisdiction in the wider sense or what has come to be known as "Anisminic jurisdiction". See, *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687.

Before we deal with each of the points raised in this appeal, it is necessary to hearken to the facts.

The appellant is a trade union. At all material times, some of its members were employed as workmen by the respondent which is an hotel. The contract of employment of these workmen was housed in a collective agreement entered into between the parties. On 1 September 1996, the respondent gave the appellant notice that it was closing down its operations with effect from 1 December 1996 in order to carry out renovations to its premises. The respondent simultaneously served on its workmen individual notices of termination of service to take effect from 1 December 1996. The respondent paid all emoluments to the appellant's workmen up to the date the termination took effect. But it did not pay the workmen any bonus. The reason for this omission forms the core of the dispute between the parties.

According to the relevant article in the collective agreement, bonus is payable to every workman who is in the employment of the respondent at 31 December of each year. The respondent's case is ingenious. It is to the following effect. All the affected members of the appellant had had their services terminated on 1 December 1996. Therefore none of them were in the appellant's service as at 31 December of that year. Hence, no bonus is payable to any of them for the year 1996.

Now, despite its ingenuousness, the Industrial Court saw through the argument. It held that on a true interpretation of the bonus provision as applied to the facts of this case, the appellant was obliged to pay bonus on a pro rata basis to the affected workmen. In doing so it relied on the following pronouncement of Harun J (as he then was) in *Progress Castings (1982) Sdn Bhd v. Metal Industry Employees Union* [1983] 2 ILR 250:

> The Company contends that it was the intention of the parties to pay bonus at the end of each year and therefore it is payable only if a year has been completed. We are in agreement with the Company that the bonus is payable only at the end of each calendar year but this is so if the Company is still in operation. In the present case, the Company has closed down and the-question is whether bonus is payable on closure of business. We find that the bonus payable is not conditional on the Company making a profit. It is in fact Deferred Salary Payment and therefore the employees are entitled to a proportion of that payment for the period they have actually worked.

Dissatisfied, the respondent applied for judicial review to quash the decision of the Industrial Court. Its application was granted. The union now appeals to us against the decision of the High Court.

We now turn to address the first issue. This in our view is concluded by authority.

In *Sykt Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748, it was held by this court that "ss. 33(1) and 56 cannot be treated as being housed in watertight compartments with no permissible overlap under any circumstances."

It was further held as follows:

> There may be circumstances, such as those as existed in *Federal Hotel v. National Union of Hotel, Bar & Restaurant Workers* [1983] 1 CLJ 67; [1983] CLJ (Rep) 150, which may warrant a superior court forming the view that an error of law has been occasioned by the court's unwarranted transgression of the power of interpretation when exercising its power of enforcement. On the other end of the scale, there may be cases in which an interpretation of an award or collective agreement is a *sine qua non* to ascertain whether there has indeed been non-compliance of the same. To say that in such circumstances the complainant is to be summarily driven away from the judgment seat because a question of interpretation has arisen, is to nullify legislative intent, namely, the expeditious settlement

> of industrial disputes. It follows therefore, that the extreme proposition that the court, when considering a complaint under s. 56(1), may never interpret an award or collective agreement in any circumstances is fallacious and not worthy of a second glance.

In our judgment the Industrial Court had threshold jurisdiction to interpret the collective agreement in order to determine whether there had in fact been non-compliance thereof.

That brings us to the second question. Here it is necessary to bear in mind the nature of the instrument that has come up for interpretation. It is a document that regulates the relationship between parties in the environment of industrial relations. It is therefore wrong to approach such a document as though it were a formal deed of conveyance falling for interpretation before the Chancery Division of the High Court of England.

As this court said in *Kesatuan Pekerja-Pekerja Perkayuan v. Sykt Jengka Sdn Bhd* [1997] 2 CLJ 276 at pp. 285-286:

> First, it is important to bear in mind that the ordinary rules of construction – whose assistance courts often pray in aid to determine contractual intention – do not apply when interpreting a collective agreement. An application of these rules will necessarily involve a rather strict and legalistic approach which is to be avoided in a case such as the present. Parliament, fully realizing that a just solution may not result in the field of industrial relations by the application of the rules of interpretation that operate in the environment of the common law, has enacted s. 30(5) of the Act, which reads as follows:
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> > The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.
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> Secondly, due recognition should be accorded to the fact that a collective agreement is not a commercial document entered into between businessmen aided by legal advice. A collective agreement deals with far more basic issues that relate to the livelihood of workmen, such as their wages and other rudimentary benefits that are essential for sustaining life. It will therefore be unsurprising to find such agreements couched in rather loose language, often lacking the degree of precision with which lawyers are familiar. A reasonable and pragmatic approach, shorn of an excess of legal learning, is therefore called for when construing a collective agreement, and in particular, any machinery that the workmen and their employer have established for the resolution of their differences.

We may add that we find much support for the view we take of the matter – in particular, the broad and liberal approach that is to be adopted to the construction of collective agreements – from the following passages in the judgment of Shah J in *Delhi Cloth Mills Co Ltd v. Its Workmen* [1969] 2 LLJ 755 at pp. 767 and 768:

> We consider it right to observe that in adjudication of industrial disputes settled legal principles have little play: the awards made are often the result of ad hoc determination of disputed questions, and each determination forms a precedent for determination of other disputes. An attempt to search for principle from the law built up on those precedents is a futile exercise. To the courts accustomed to apply settled principles to facts determined by the application of the judicial process, an essay into the unsurveyed expanses of the law of industrial relations with neither a compass nor a guide, but only the pillars of precedents is a disheartening experience. The Constitution (and, in Malaysia, Parliament) has, however, invested this court with power to sit in appeal over the awards of industrial tribunals which are, it is said, founded on the somewhat hazy background of maintenance of industrial peace, which secures the prosperity of the industry and improvement of the conditions of workmen employed in the industry, and in the absence of principles precedents may have to be adopted as guides – somewhat reluctantly – to secure some reasonable degree of uniformity or harmony in the process.
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> But in the branch of law relating to industrial relations, the temptation to be crusaders instead of adjudicators must be firmly resisted. It would not be out of place to remember the statement of the law made in a different context but nonetheless appropriate here – by Douglas J of the Supreme Court of the United States in *United Steel Workers of America v. Enterprise Wheel & Car Corp* ([1960] 363 US 593):
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> > ... as arbitrator ... does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the awards.
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> We may at once state that we are not for a moment suggesting that the law of industrial relations developed in our country has proceeded on lines parallel to the direction of the law in the United States.

> We may repeat that in matters relating to the grant of gratuity and even generally in the settlement of disputes arising out of industrial relations, there are no fixed principles, on the application of which the problems arising before the tribunals or the courts may be determined; and often precedents of cases determined ad hoc are utilized to build up claims or to resist them. It would, in the circumstances, be futile to attempt to reduce the grounds of the decisions given by the industrial tribunals, the Labour Appellate Tribunal and the High Courts to the dimensions of any recognized principle.
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> It is with these matters in mind that we approach the inquiry whether the Industrial Court placed an erroneous interpretation on the first award and the collective agreement.

It is in this area, we think, that the High Court fell into error. In our view, it was wrong in accepting the respondent's invitation to interpret the collective agreement in a narrow and pedantic manner.

This is a case in which the respondent took careful steps to evade its obligations under the collective agreement. It ensured that none of the workmen concerned were in its employment at the contractually operative date for the sole purpose of preventing them from claiming the bonus payment. In our judgment, the respondent's conduct smacks of unfair labour practice. The Industrial Court, acting in accordance with well established principles of industrial law and equity, found against the respondent. We are unable to detect any error of law in its award. Further, we are satisfied that any reasonable tribunal armed with the material presented to the Industrial Court in this case would have come to like decision.

For the reasons already given this appeal must succeed and the orders usually consequent upon success will be made.